

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION**

**BILLIE FIELDS, as Personal Representative
of the Estate of VICTORIA FIELDS,**

Plaintiff,

v.

Civil Action No. 2:15-01547

**HEALTH CARE AND RETIREMENT
CORPORATION OF AMERICA, LLC
d/b/a HEARTLAND OF CHARLESTON;
MANOR CARE, INC., f/k/a
HCR MANOR CARE, an Ohio Corporation;
HEALTH CARE AND RETIREMENT
CORPORATION OF AMERICA, an Ohio
Corporation; and DANNY DAVIS, Administrator,**

Defendants.

NOTICE OF REMOVAL

Defendants, Health Care and Retirement Corporation of America, LLC d/b/a Heartland of Charleston; Manor Care, Inc., f/k/a HCR Manor Care; and Health Care and Retirement Corporation of America (hereinafter collectively referred to as these “Defendants”), by and through counsel, pursuant to 28 U.S.C. § 1441 and 28 U.S.C. § 1446, hereby notify the Court that the above-referenced civil action has been removed from the Circuit Court of Kanawha County, West Virginia to the United States District Court for the Southern District of West Virginia, Charleston Division, for further proceedings. As grounds for removal, these Defendants state as follows:

1. On or about September 9, 2014, the subject action was commenced in the Circuit Court of Kanawha County, West Virginia and is now pending in that court.

2. Plaintiff did not serve the original Complaint on any of the Defendants named in the subject action.

3. On or about January 6, 2015, Plaintiff filed the Amended Complaint.

4. On or about January 7, 2015, the Secretary of State of the State of West Virginia accepted service of the Summons and the Amended Complaint on behalf of these Defendants. *See Exhibit A.*

5. At the time of the filing of this Notice, Defendant Danny Davis has never been served in this action.

6. Unserved defendants do not need to join in the notice of removal. *See Adams v. Lederle Labs.*, 569 F. Supp. 234, 243 (W.D. Mo. 1983)). *See also* 16-107 Moore's Federal Practice - Civil § 107.30.

7. Additionally, unserved defendants may be disregarded when determining the diversity of the parties. *See Pecherski v. General Motors Corp.*, 636 F.2d 1156, 1160-1161 (8th Cir. 1981). *See also* 16-107 Moore's Federal Practice - Civil § 107.30.¹

8. Attached to this Notice of Removal as *Exhibit B* is a copy of the Docket Sheet from the Circuit Court of Kanawha County, West Virginia, and all documents that, as of the filing of this Notice of Removal, have been filed in the Circuit Court of Kanawha County, West Virginia, which includes a copy of all process, pleadings, and orders served upon these Defendants in this action to date.

9. This Notice of Removal is timely under 28 U.S.C. § 1446(b) as it is being filed within thirty (30) days of these Defendants' receipt of the Amended Complaint.

¹ Even if the citizenship of the unserved defendant in this case, Danny Davis, were considered by the Court, diversity of citizenship would still exist. The Amended Complaint incorrectly identifies Defendant Danny Davis as a citizen of West Virginia. See Amended Complaint, ¶ 21. Instead, Defendant Danny Davis, upon information and belief, is a citizen of Florida.

10. This Court has original jurisdiction over this action based upon diversity of citizenship and amount in controversy pursuant to 28 U.S.C. § 1332.

11. According to the Amended Complaint, Plaintiff seeks to recover for, among other things, alleged injuries and damages related to: violations of the Nursing Home Act; negligence resulting in personal injuries; medical malpractice; ordinary negligence/reckless misconduct; and wrongful death.

12. It appears from the Plaintiff's Amended Complaint and allegations that the amount in controversy exceeds, exclusive of interest and costs, the sum of Seventy-Five Thousand Dollars (\$75,000.00).

13. Despite the fact that Plaintiff did not plead a specific dollar amount in the Amended Complaint, removal is appropriate under the principles set forth in *Mullins v. Harry's Mobile Homes, Inc.*, 861 F. Supp. 22 (S.D.W.Va. 1994) and *Durbin v. Dacar*, 2010 U.S. Dist. LEXIS 11685 (N.D.W.Va. 2010).

14. Plaintiff Billie Fields, upon information and belief, is a citizen of Clay County, West Virginia. *See Amended Complaint*, ¶ 1.

15. Defendant Health Care and Retirement Corporation of America, LLC d/b/a Heartland of Charleston is a Delaware limited liability company with its principal place of business in Ohio.

16. Defendant Manor Care, Inc., f/k/a HCR Manor Care, is an Ohio corporation with its principal place of business in Ohio.

17. Defendant Health Care and Retirement Corporation of America is an Ohio corporation with its principal place of business in Ohio.

18. Therefore, this action is between citizens of different states.

19. A copy of the Notice of Filing of Notice of Removal, which was filed with the Circuit Court of Kanawha County, West Virginia, is attached hereto as *Exhibit C*.

WHEREFORE, these Defendants hereby give Notice that the within removal is hereby effected and that no further action by the Circuit Court of Kanawha County, West Virginia shall take place unless and until this civil action be remanded by this Court.

**HEALTH CARE AND RETIREMENT
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d/b/a HEARTLAND OF CHARLESTON;
MANOR CARE, INC., f/k/a
HCR MANOR CARE, an Ohio Corporation;
and HEALTH CARE AND RETIREMENT
CORPORATION OF AMERICA, an Ohio
Corporation.**

BY COUNSEL

/s/ Elizabeth A. Duncan
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Defendants.

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of February, I electronically filed the “*Notice of Removal*” with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following CM/ECF participants:

Andrew L. Paternostro, Esquire (WV Bar #5541)
Sprague W. Hazard, Esquire (WV Bar #1651)
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/s/ Elizabeth A. Duncan